IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 8TH MARCH 2011 / 17TH PHALGUNA 1932

CRL.A.No. 171 of 2003()

ST.6/2001 of CHIEF JUDICIAL MAGISTRATE COURT, MANJERI
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APPELLANT(S): COMPLAINANT

M.P.SALIM S/O. MOIDEEN KUTTY,
THANIKUZHIYIL HOUSE, KADAMBODE, PANTHALLUR,
MALAPPURAM DISTRICT

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S): ACCUSED AND STATE
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1. MOHEMMED ALI K. S/O. IBRAHIM, KUNNUMMEL HOUSE, MUTTIPPALAM, MANJERI, MALAPPURAM DIST.

2. THE STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31

ADV. SRI.K.M.SATHYANATHA MENON
PUBLIC PROSECUTOR SRI.C.M.NAZAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/03/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

Criminal Appeal No.171 of 2003

Dated 8th March, 2011.

J U D G M E N T

This appeal is filed against the order of acquittal passed under Section 255(1) of the Code of Criminal Procedure ('the Code' for short).

2. The appellant is the complainant. He filed a complaint against first respondent alleging offence under Section 138 of the Negotiable Instruments Act (for short, 'the Act'). As per the allegations in the complaint, the accused borrowed Rs.2,00,000/- from the complainant on 30.9.2000. The accused demanded the said sum from the complainant for the purpose of repaying a debt which he had incurred to another person. At the time of borrowing the money, accused promised to pay back the same to the complainant by selling his mother's property and house within a month.

3. On 4.11.2000, the complainant demanded the accused to repay the amount. Instead of making repayment in cash, the accused issued cheque Ext.P1 drawn on his account for Rs.2,00,000/-. The cheque was presented to the bank and it was returned stating “funds insufficient”. The complainant

issued a lawyer notice calling upon him to repay the amount within 15 days. The accused received the notice, but he failed to repay the amount. He sent a reply notice making untrue facts and false averments. After complying with the legal formalities, the complainant filed complaint alleging offence under Section 138 of the Act.

4. To prove the prosecution case, complainant himself examined as PW1 and marked Exts.P1 to P10. The accused examined DW1 on his side. The accused put forward a case that this is a false case foisted at the instance of one Rukhiya, the aunt of the complainant to whom he had issued a blank cheque as security while getting Rs.10,000/- from her. He had issued this blank cheque to Rukhiya as insisted by her, but misusing those cheques the other sons and sisters of Rukhiya filed different cases before the same court as S.T.1/01, S.T.2/01, S.T.7/01 and this case. This case is foisted against accused by misusing the blank cheque which was handed over to Rukhiya. The accused has not issued any cheque to the complainant and no amount was due from the accused to the

complainant and hence he is not liable for offence under Section 138 of the Act.

5. The trial court analysed the evidence adduced on both sides and held thus :

> "It seems that the entire family of PW1 and Rukhiya kept a huge amount ready to lend to the accused. Strange indeed. It is also in evidence that the amount shown in all those cheques is also Rs.2,000/- each. That also would only probabilise the case put forward by the accused and would make the case put forward by the complainant further suspicious."

6. The trial court also found that there is difference in the admitted portion of Ext.P1 and the disputed portion. It is held :

> "When we compare that portion with the remaining writings and the entires in Ext.P1, per se, it can be seen that the disputed writings are with different pen and ink and in different hand writing ..... Difference in ink and difference in writing in Ext.P1 will only lend support to the contention of the accused and not of the complainant".

7. The trial court also found that complainant has to discharge the burden to prove that he advanced Rs.2,00,000/-

to the accused and to discharge that liability the accused issued a cheque to him, as alleged. It was also held that the case put forward by the complainant does not appear to be convincing, on the basis of the above findings.

8. Heard both sides. Perused the records. The complainant, as PW1 gave evidence consistent with the averments made in the complaint. He specifically deposed that Ext.P1 cheque was written in the handwriting of the accused in his presence and also signed in his presence. He also stated that there was some correction in the name written on the cheque Ext.P1 and there also, accused had signed. A perusal of Ext.P1 shows that there is a correction and a signature in the name of the payee in Ext.P1 and it is consistent with what is stated by PW1. PW1 categorically deposed that the cheque Ext.P1 was written and signed in his presence. So many details were stated by him in the evidence.

9. To corroborate the evidence of PW1, he also made a request to send Ext.P1 for expert opinion. He filed C.M.P.6671 of 2001 under Section 45 of the Indian Evidence

Act. Since the signature and the handwriting are denied by accused, the complainant wanted to get Ext.P1 cheque sent to the handwriting expert to ascertain whether the handwriting and the signature were that of the accused himself. He also filed a petition C.M.P.27 of 2002 to direct the accused to give specimen signature and specimen handwriting to compare the same with the disputed one under Section 73 of the Indian Evidence Act. Specimen signature was also obtained as per a direction from the court. Though the prayer for reference to the expert was rejected, the court ordered that the specimen signature of the accused would be called for from the bank.

10. PW1 was cross examined at length. But, nothing was brought out from his evidence to show that the version given by PW1 regarding the handwriting and signature of the accused in Ext.P1 is false. The petition filed by the petitioner to get the signature and handwriting examined by the expert was opposed by the defence. On a comparison of the specimen signature and handwriting with the handwriting and signature in Ext.P1 by this court, those appear to be of the

same person. The court below however did not state in the order whether the handwriting in the specimen and that in Ext.P1 are different. He has not compared the specimen handwriting with Ext.P1.

11. But the case of accused is that one of the blank cheques issued to one Rukhiya was misused by PW1. His definite case is that blank cheques were issued to the said Rukhiya who is the aunt of PW1 and one such cheque was misused by PW1 to file the complaint. Nothing brought out from the evidence of PW1 to show that Ext.P1 at the time of handing over was a blank cheque or that it was the cheque handed over to Rukhiya. A mere statement made while questioned under Section 313 Cr.P.C. is not sufficient to throw any doubt in the veracity of the evidence given by PW1. Unless the evidence is inherently improbable or it is discredited by cross examination or it is rendered unbelievable on the basis of any facts and circumstances of the case, which emerge from the evidence, the evidence of a witness cannot be discarded.

12. On a mere defence taken up by the accused that

the cheques produced in the case was blank cheque at the time of handing over the same to another person, the court shall not view the case of the complainant with any suspicion. The same situation will arise vice versa also. When the accused put forward a case that the cheque which was produced in the case was blank cheque when it was handed over it contained only signature, the court shall not view such defence with suspicion. Both cases required and deserve consideration by the court and the court has to weigh the evidence on the scale of probabilities and decide whether the case set up by the prosecution or the defence has been proved in accordance with Section 3 of the Evidence Act.

13. The court shall not look at the case set up by the prosecution or the defence with any pre-conceived notion, prejudice or suspicion. Both deserve unbiased, impartial scrutiny and a decision can be rendered only based on the evidence available on record. It appears from the order under challenge that the court below acted on surmises and conjuncters. The trial court viewed the case of the complainant

with suspicion which was totally unwarranted on the facts and circumstances of the case. The court was of the opinion that it was strange that the entire family of PW1 and Rukhiya would keep huge amount ready to be lent to the accused. This opinion is expressed not on the basis of evidence.

14. It has come out in evidence that other cases are filed by the relatives of PW1 who are also related to Rukhiya against the accused in this case for producing cheques, handing over amounts of Rs.2,00,000/- each. The mere existence of such cases is not sufficient to hold that such huge amount may not be given or kept by the family members of PW1, especially since none of his family members could be examined in this case. Apart from this, nothing has been brought out from the evidence of PW1 to show that such a conduct is a strange one. The court can express its opinion only on the basis of evidence available on record. But, nothing is brought out from the evidence of PW1 to disclose any strange conduct of the relatives of PW1. Learned counsel appearing for the appellant pointed out that all the other cases ended in conviction and

those were confirmed in revisions filed before this Court.

15. Apart from all these, the evidence adduced on behalf of the accused person would lead to a conclusion that the cheque produced in this case was blank cheque at the time when it was handed over by the drawer to another. PW1 was examined to prove that Ext.P1 was handed over to Rukhiya and it was only a blank cheque at the time when it was handed over. But such a conclusion cannot be made on the basis of the evidence of DW1. DW1 did not depose before the court that Ext.P1 was a blank cheque signed by the accused and handed over to Rukhiya. Ext.P1 was not shown to DW1, while he was in the box. DW1 had no case when examined in court that accused had given any blank cheque to Rukhiya.

16. DW1 stated that those cheques were given as security, but those cheques were all signed and written in the presence of DW1. A pointed question was put to him whether those cheques were written and signed in the presence of PW1 to which, the witness answered in the affirmative. Therefore, the case set up by the accused that blank cheques were issued

is not disclosed by the evidence of DW1 himself. It is only a case put forward by the accused at the time of questioning under Section 313 which does not gain any support from the evidence. On the other hand, the evidence adduced by accused negatives the contention taken up by accused regarding issuance of blank cheque and that Ext.P1 is one such blank cheque which was filled by the complainant.

17. In the light of the cogent evidence given by PW1, which is not discredited in cross examination, the finding of the court based on a perusal of the writing in Ext.P1 that “the difference in ink and difference in writing in Ext.P1 only lends support to the contention of the accused and not of the complainant” is not sustainable. Except a statement given by the accused at the time of questioning under Section 313 Cr.P.C. that blank cheque was issued, such version is not probabilised by the evidence either adduced or through DW1 or on the basis of any material brought out from the evidence of PW1 or any circumstance in this case.

18. The trial court has proceeded as if the cheque is

blank cheque without any basis or evidence on record. The approach in appreciating the evidence of PW1 and the case set up by the prosecution is not legally acceptable. The complainant having proved that Ext.P1 is a cheque drawn by the accused which contains the handwriting and signature of the accused, it can be presumed that it was drawn for consideration. The case of the complainant is that the said cheque is drawn for the discharge of debt or liability which the accused incurred in favour of the complainant. He also gave evidence that he is entitled to receive and recover the amount due as per Ext.P1 from the drawer, since he has given Rs.2,00,000/- to him.

19. The version given by PW1 that he handed over Rs.2 lakhs to the accused also is not discredited in cross examination. In the above circumstances, the presumption under Section 139 of the Code can also be drawn in favour of the complainant. It can be presumed that the complainant who is the holder of the cheque received the cheque of the nature stated in Section 138 for discharge of a debt or liability.

Having proved Ext.P1 as a cheque written and signed by the accused and it shows that it is drawn for the purpose of paying Rs.2 lakhs to the complainant, it can be presumed that the complainant had received the cheque from the accused for the purpose of discharging debt or liability and not for any other purpose. This presumption stands unrebutted.

20. There is nothing in the evidence of DW1 to connect the transaction alleged against him with the transaction which is put forward by the prosecution case. In fact, it has been brought out from the evidence of DW1 that he did not know whether PW1 and the accused had any money dealings between each other and he also pleaded ignorance and he did not know the details of the cheque which was handed over to Rukhiya by the accused. He did not know the name of the bank and cannot remember the cheque number etc. He also gave contradictory statement regarding the direction of the face of the house of Rukhia when he was examined in court in this case and in other case. He deposed that the house was facing west at the time of his examination in

this case whereas in the other case, as per Ext.P1, he stated that house was facing to north. The definite case of DW1 is that he had gone to the house of Rukhiya in connection with transaction and issuance of cheque. The evidence of DW1 is totally insufficient to probabilise the case set up by the defence.

21. In the above circumstances, I hold that the prosecution has succeeded in proving that the accused committed an offence under Section 138 of the Act. The accused/first respondent is therefore found guilty of the offence under Section 138 of the Act and he is sentenced to undergo simple imprisonment for three months and also to pay compensation of Rs.2 lakhs to PW1. In default of payment or recovery of such amount in accordance with law, he shall also undergo imprisonment for three months in civil prison.

The appeal is allowed.

K.HEMA, JUDGE.

Krs.